No. 86 1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARY LUCILLE COULTER,

Petitioner,

v.

STATE OF TENNESSEE, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that under the fee-shifting provision in Title VII of the Civil Rights Act of 1964 an attorney must receive less than the market rate for his or her services if the appellate court believes a merely competent attorney could have been hired for less?

2. Did the court of appeals err in applying an arbitrary percentage limit on the number of compensable hours, 3% of the hours devoted to other issues, spent in collecting fees pursuant to the fee-shifting provision of Title VII?

3. Did the court of appeals adopt a standard of review which conflicts with this Court's standard requiring a "concise but clear" explanation for a fee award when it affirmed a significant reduction in a request for attorney's fees merely because it did "not believe the District Court acted arbitrarily or irrationally?"

PARTIES

The parties are the plaintiff, Mary Lucille Coulter, and the defendants, State of Tennessee, Department of Transportation of the State of Tennessee, Department of Personnel of the State of Tennessee, and Darrell D. Akins, Commissioner of the Department of Personnel.

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PETITION FOR WRIT OF CERTIORARI
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Petitioner Mary Lucille Coulter prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on October 29, 1986.

OPINIONS BELOW

The decision of the court of appeals is reported at 805 F.2d 146 and is set out at pp. 5a-40a of the Appendix. The order denying rehearing, which is not reported, is set out at pp. 1a-2a. The district court's agreed memorandum of decision of August 3, 1984, which is not reported, is set out at pp. 50a-56a of the Appendix. The district court's memorandum of decision, which is also not reported, regarding the award of attorney's fees, dated November 5, 1984, is set out at pp. 41a-48a.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1986. A timely petition for rehearing and suggestion for rehearing en banc was denied by an evenly divided court on December 18, 1986. On March 9, 1987, Justice Scalia entered an order extending the time for filing this petition until April 17, 1987. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 706(k) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(k), provides:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a

> reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

A. The Successful Representation of Ms. Coulter by Attorneys Belton and Arthur.

Plaintiff Coulter received a determination from the Equal Employment Opportunity Commission that there is no reasonable cause to believe that her discrimination charge was true. Sixth Circuit App. 117.[1] After receiving the adverse determination Ms. Coulter requested an attorney, Aleta Arthur, to file a civil action on her behalf alleging that the Department of

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[1] "Sixth Circuit App." refers to the appendix which was filed before the United States Court of Appeals for the Sixth Circuit in the appeal of this case.

Transportation of the State of Tennessee intentionally discriminated against her on the basis of her gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., when she was denied a promotion to the position of Regional Office Manager.

Ms. Arthur had never "tried an employment case." Therefore, she agreed to the representation of Ms. Coulter only after Robert Belton consented to serve as co-counsel. Sixth Circuit App. 202. Mr. Belton, has more than twenty years of fair employment litigation experience, taught equal employment law at Vanderbilt Law School when Ms. Arthur was a student at the school, and has "been involved in more than 250 employment discrimination cases throughout the United States as chief counsel or co-counsel [including]

Griggs v. Duke Power Co., 401 U.S. 424 (1971) [and] Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)...." Sixth Circuit App. 129.[2]

The plaintiff's proof of intentional discrimination was established in a carefully developed manner which reflected Mr. Belton's experience. The issue was focused by the filing of a summary judgment motion which "showed that his client had made out a prima facie employment discrimination case and that the state had failed to ... come forward with a valid reason for the failure to promote the plaintiff...."

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[2] Mr. Belton has authored numerous law review articles about the fair employment laws, and recently co-authored a textbook on employment discrimination litigation. J. Jones, W. Murphy, and R. Belton, Cases and Materials on Discrimination in Employment (5th ed. West 1987).

App. 25a. As a result of the motion the state had to file an amended pleading "to allege a justification." Id. Having ascertained the asserted legitimate nondiscriminatory reason the plaintiff filed discovery, interrogatories, requests for admission, and depositions, which progressively narrowed the question and permitted the plaintiff "to show that the justification the state advanced was a pretext." Id.

Following the discovery "Mr. Belton prepared extensive stipulations of fact, based in major part on answers to previous interrogatories he had prepared, and an able trial brief. His conceptualization of the case and his stipulations and brief contributed to a successful outcome...." App. 26a-27a. At trial plaintiff Coulter did not

present a single witness but rather relied upon the written work, stipulations and pre-trial brief, prepared by Mr. Belton. The defendants presented three witnesses, App. 51a, and the trial lasted "less than half a day," App. 43a.

"At the conclusion of the presentation of the defendants' case, the Court ruled from the bench ... that the plaintiff had carried her burden of proving ... that defendants had discriminated against the plaintiff on the basis of her sex, in violation of Title VII of the Civil Rights Act of 1964." 51a-52a. The court ordered the promotion of Ms. Coulter to a managerial position, the payment of back pay and the award of "comp time." App. 53a-54a.

B. The Award of Attorney's Fees.

Mr. Belton submitted a petition for fees requesting compensation for 185.59 hours at an hourly rate of $110 per hour for 1982 and $125 per hour for 1983 and 1984.[3] Sixth Circuit App. 124-25. Belton submitted precise time records and six affidavits supporting the reasonableness of his request for fees. For example, Mr. Lawrence Ashe who regularly represents defendant companies in employment discrimination cases in the Federal Courts in Tennessee testified that "Belton has been a pioneer and a leading specialist in the field of employment discrimination [, that he] is one of a literal handful of the most

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[3] The defendants settled any claim by Ms. Coulter for fees for the professional services of Ms. Arthur. App. 55a.

highly-regarded employment discrimination attorneys for plaintiffs in the United States," and that Belton's requested rates "are entirely consistent with what I would expect to see paid in Nashville for an attorney of ... Belton's reputation and accomplishments...." Id. 166-67.[4]

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[4] Mr. Barnett, who has practiced in Nashville, Tennessee, for 30 years, testified that he is "intimately familiar" with the fees charged by lawyers in employment discrimination, civil rights, and related types of cases and that Belton's request for "fees [is] reasonable and certainly represent[s] the prevailing market rate in this community [and] is below some Nashville lawyers' fee schedule for this or similar type of work." Sixth Circuit App. 161-62.

Leroy D. Clark, a law professor at Catholic University School of Law, who served as General Counsel of the Equal Employment Opportunity Commission from 1978 to 1980 testified that he "supported the grant of tenure [by Vanderbilt Law School to Belton] on the grounds that he was one of the most consistent scholarly contributors in th[e] area of" fair employment law. Id. 153-54. The other

The only counter-evidence submitted by Tennessee was an affidavit of a state official stating that Tennessee paid counsel representing Tennessee less than the hourly rate requested by Belton, Sixth Circuit App. 189-90. In its brief Tennessee represented that it had "agreed to pay

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three affiants similarly testified about the reasonableness of the fee requests or Mr. Belton's experience or both. Id. 139-51; 158-60.

Moreover, in other decisions the Sixth Circuit has recognized that the rates requested by Mr. Belton were reasonable for an experienced attorney. Kelley v. Metropolitan County Board of Education, 773 F.2d 677, 683 (1985) (en banc) (An attorney in Nashville who is skilled and experienced in civil rights work is entitled to "a minimum rate of $120 per hour"); Green v. Francis, 705 F.2d 846, 850 (6th Cir. 1983) ("Two reputable members of the Nashville, Tennessee bar filed affidavits ... stat[ing] that it is not unusual among leading members of the Nashville Bar to charge a fee ranging from $150 to $200 per hour for both office and courtroom work.")

[Ms. Arthur]" an hourly rate of $85 per hour and "[t]o set a higher rate of compensation" for Mr. Belton "would create a windfall" for him. Sixth Circuit App. 181.

The district court reduced Mr. Belton's requested fee by about 40% from approximately $22,000 to $14,000. App. 43a, 49a. The district court refused to compensate Mr. Belton for approximately 30% or 56 of the 185 hours for which compensation was requested because the court concluded that the request was "inordinate," "unreasonable," "must be duplicate[ ]" hours, less time was "sufficient" or the work was "a motion in futility." App. 44a-47a.

Moreover, the court reduced the hourly rate requested for 1982 from $110 to $85 per hour[5] and for 1983 and 1984 from $125 per hour to $110 per hour because the court "find[s] this is a reasonable fee per hour for the services rendered...." App. 47a. The court made neither findings in support of this conclusion nor reference to Belton's

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[5] In part, the court reduced the hourly rate of $110 per hour requested for the 4.25 hours expended in 1982 to $85 per hour because Belton had filed a petition in another case requesting an hourly rate of $85 for work performed in 1982. App. 42a, 47a. Mr. Belton requested $85 per hour in the pertinent case on the basis of a benchmark for hourly rates set by the district court in that case in 1980. Belton had requested $100 per hour for time performed prior to 1980 but the court only awarded him $75 per hour based on evidence submitted by the State under a "cost-plus" theory. Since the Supreme Court did not reject this theory until 1984, Blum v. Stenson, 465 U.S. 886, Belton did not challenge the rate set earlier in the case. Sixth Circuit App. 207.

undisputed evidence about the applicable market rate in Nashville.

The Sixth Circuit affirmed the district court's reduction of Belton's requested hourly rate and number of compensable hours except for the 16.75 hours claimed for the presentation of the motion for summary judgment.[6] As to hourly rates the Sixth Circuit announced a novel legal rule limiting the hourly rate awarded a highly experienced, renowned plaintiff's attorney to that commanded in the market place by an inexperienced, merely competent attorney. App. 11a-12a, 16a-18a.

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[6] The Sixth Circuit rejected the conclusion that the motion for summary judgment was "a motion in futility," because "this particular ... motion advanced Mr. Belton's case and was a factor in winning." App. 25a.

The Sixth Circuit announced a second novel legal principle in reducing Mr. Belton's claim from 13 hours to 5 hours for compensation for work done litigating for attorney's fees. Without questioning the accuracy[7] of Mr. Belton's expenditure of 13 hours in collecting his attorney's fees, the appellate court imposed an arbitrary numerical limit on the amount of compensable time in litigating the issue of fees:

> In the absence of unusual circumstances, the hours allowed for preparing and litigating the attorney fee case should not exceed 3% of the hours in the main case when the issue is submitted on the papers without a trial and should not exceed 5% of the hours in the main case when a trial is necessary.

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[7] The issue concerning compensable hours did not "involve ... padding,misrepresentation, or dishonest accounting." App. 21a.

App. 23a-24a.

The Sixth Circuit also upheld the district court's refusal to compensate Belton for 31 of the 62 hours for which he requested compensation for preparing the stipulations, the pretrial brief and for trial preparation because it did "not believe the District Court acted arbitrarily or irrationally...." App. 26a.

The Sixth Circuit denied Coulter's petition for rehearing en banc. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

This case presents critically important legal questions about the proper implementation of the fee-shifting statutes.[8] The issues are so important

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[8] The standards for applying the attorney's fee provisions in civil rights cases "are generally applicable in all

because the significant 40% reduction ordered by the Sixth Circuit in the plaintiff's fee request was not based on the particular facts of this litigation but resulted form two novel legal principles which conflict with this Court's rulings and with the decisions of other courts of appeals.

In Hensley v. Eckerhart, 461 U.S. 424 (1983), and Blum v. Stenson, 465 U.S. 886 (1984), the Court established

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cases in which Congress has authorized an award of fees to a 'prevailing party.'" Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983). Last Term the standards adopted for civil rights cases were applied to § 304 of the Clean Air Act and, in doing so, the Court observed that "[t]here are over 100 separate statutes providing for the award of attorney's fees [which] although these provisions cover a wide variety of ... causes of action, the bench mark of the award under nearly all of these statutes is that the attorney fees must be 'reasonable.'" Pennsylvania v. Delaware Valley Citizens Council, 92 L.Ed.2d 439, 453-54 (1986).

guidelines for the determination of attorney's fees. These guidelines have not resulted in the anticipated uniformity and predictability of attorney's fees decisions.

First, the lower courts are in sharp conflict and disarray over the proper method for determining a reasonable hourly rate which is the linchpin for the calculation of attorney's fees. See, Hensley v. Eckerhart, 461 U.S. at 433.[9] The Sixth Circuit relies not upon the hourly rate in the market place for highly experienced attorneys but rather establishes a lower rate for those

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[9] The lower courts have developed conflicting positions since "the Supreme Court has not set out the method by which district courts are to determine the hourly rate of attorneys working for profit." Laffey v. Northwest Airlines, 746 F.2d 4, 16 (D.C. Cir. 1984) (en banc), cert. denied, 469 U.S. 1181 (1985).

attorneys if there are competent attorneys "in the region [who] normally" receive a lower rate. App. 11a. At least six other circuits have adopted a market-based approach in conflict with the Sixth Circuit's rule. However, these circuits have adopted five different and conflicting approaches for establishing the market rate. One of these approaches, the "narrow market" rule of the Eleventh Circuit, may undercut the effective implementation of the fee statutes as much as the Sixth Circuit's rule.[10] Section I, A.

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[10] In Mayson v. Pierce, 806 F.2d 1556, 1556 (1987), the Eleventh Circuit approved the payment of fees to a plaintiff's attorney at a lower rate than that attorney usually earned when representing companies because Title VII plaintiffs cannot afford highly paid attorneys in the market place.

By rejecting the Court's command that fees "are to be calculated according to the prevailing market rate," Blum v. Stenson, 465 U.S. at 895, the Sixth Circuit makes attorneys fees proceedings more subjective and unpredictable since the readily obtainable evidence of the prevailing market rate for an attorney's services is not determinative. Moreover, the Sixth Circuit's decision will drive experienced counsel away from the representation of civil rights plaintiffs. Highly experienced attorneys or members of law firms or organizations with a national practice have a strong economic incentive to steer clear of cases within the Sixth Circuit and to select cases within the three circuits which depend upon the billing rate of an attorney to establish reasonable fees.

Section II, infra.

Second, in conflict with five circuits, the Sixth Circuit limits the compensable hours for litigation spent in the collection of fees to a flat percentage, 3%, of the hours devoted to other issues. Section I, B, infra. By rejecting the presumption that a prevailing plaintiff's attorney will "normally" receive compensation for "all hours reasonably expended," Hensley, 461 U.S. at 435, the Sixth Circuit undermines the incentive for attorneys to represent civil rights plaintiffs because there is the expectation that they will receive compensation for all their work which was reasonably performed. Section II, infra.

Third, in conflict with the Hensley and Blum requirement and the practices of other appellate courts, the Sixth Circuit

did not require the district court to provide a "clear explanation" for its award of fees. By upholding the award even though the lower court made no findings to supports its conclusory statements, the Sixth Circuit failed to ensure that the purposes of the fee statute were satisfied. Section III, infra.

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER APPELLATE COURTS WITH RESPECT TO THE DETERMINATION OF HOURLY RATES AND COMPENSABLE HOURS.

A. Hourly Rates.

In Coulter the Sixth Circuit implements the Hensley-Blum standard for determining attorney's fees in a manner which squarely conflicts with the implementation by the other circuits. Contrary to the Sixth Circuit, the other circuits determine the appropriate hourly

rate based upon the market rate for the services of the attorney who requests the fees.

In the Sixth Circuit a highly experienced lawyer will not be awarded his customary hourly rate if there are merely competent attorneys "in the region [who] normally receive" a lower rate and whom the court determines might have litigated the case. App. 11a. While the Sixth Circuit explicitly rejected reliance upon the billing rate of the plaintiff's attorney, the District of Columbia, First and Third Circuits just as explicitly have relied upon the billing rate.

The District of Columbia Circuit has ruled that "[f]or lawyers engaged in customary private practice ... the market place has set [the] value" for their

services. Laffey v. Northwest Airlines, Inc., 746 F.2d at 18. The billing rate of attorneys "reflects the training, background, and previously demonstrated skill of the individual attorney in relation to other lawyers in that community." Id. In applying the billing rate rule, the First Circuit concluded that "[s]kill and experience [are a litigator's] stock-in-trade" and a district court properly "paid his asking price...." Wildman v. Lerner Stores Corp., 771 F.2d 605, 610-11 (1985);[11] see also, Black Grievance Committee v.

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[11] The First Circuit extended the billing rate rule to apply to the "outside specialist's ordinary rate." Marcia v. Pagan, 698 F.2d 38, 40 (1983). "If the courts (without cause) award fees at less than that rate, they will tend to prevent those in smaller communities from obtaining the experienced legal counsel they may need, contrary to the policy behind awards of attorneys' fees to prevailing parties."

Philadelphia Electric Co., 802 F.2d 648, 652 (3d Cir. 1986); Pawlak v. Greenawald, 713 F.2d 972, 979 (3d Cir. 1983), cert. denied, 104 S. Ct. 707 (1984).

While the circuits other than the Sixth Circuit join in applying a market-based approach to the determination of an appropriate hourly rate, there are conflicts among the circuits as to the proper market-based approach.

Two circuits, the Ninth and Tenth, expressly reject any primary reliance placed upon the "billing rate" for determining a reasonable hourly rate. The Ninth Circuit approved the calculation of an hourly rate "based upon that which private counsel of similar experience, reputation, and skill could command in cases of similar complexity in the community" and the rejection of

reliance upon "the counsel's customary hourly rate," White v. City of Richmond, 713 F.2d 458, 460-61 (1983). The Tenth Circuit joined the Ninth Circuit in determining that "[t]he hourly rate should be based on the lawyer's skill and experience in civil rights or analogous litigation" and that a counsel's "customary rate would be [a] relevant but not conclusive factor." Ramos v. Lamm, 713 F.2d 546, 555 (1983).

Although it has not expressly rejected primary reliance upon the billing rate of an attorney, the Second Circuit also calculates a reasonable rate for an attorney by a comparison with "the hourly amount to which attorneys of the skill in the area would typically be entitled for a given type of work...." City of Detroit v. Grinnell Corp., 495

F.2d 448, 471 (2d Cir. 1974); see also, Lenihan v. City of New York, 640 F. Supp. 822, 827 (S.D.N.Y. 1986).

As does the "billing rate" rule, the "similar skill" rule guides the courts to the adoption of the market rate for the services of the attorney who requests the award. Unlike the Coulter "competent attorney" standard both the "billing rate" and "similar skill" rules focus upon the specific experience and skill of the petitioning attorney although in any given case the rules may lead to quite different results.

By relying upon contingency arrangements the Seventh Circuit adopts yet another market-based rule. Lenard v. Argento, 808 F.2d 1242, 1247-48 (1987). Since some types of civil rights cases, like "tort cases," are "conventionally

and satisfactorily handled on a contingent basis ... the fee set in the contingent fee contract would have been presumptively adequate to attract competent counsel." Id. at 1247. In circumstances where the contingency arrangements usually relied upon in the market place can "induce" competent counsel to represent civil rights plaintiffs, then the courts should permit the market place to work and adopt a contingency rather than lodestar approach to the calculation of reasonable fees. Id. at 1247-48.[12]

The Fifth Circuit follows yet another market-based rule although a

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[12] The Seventh Circuit stated that the "contingency rule" adopted in Lenard is not inconsistent with City of Riverside v. Rivera, 91 L.Ed.2d 466 (1986) since no Justice "suggested that the terms of ... a [contingency] contract were irrelevant...." Lenard, 808 F.2d at 1248.

panel of the court recently stated, that the "Fifth Circuit law on the status of [the application of] Johnson [v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), to calculate reasonable attorney's fees] is in disarray." Bhandari v. First National Bank of Commerce, 808 F.2d 1082, 1104 (5th Cir. 1987). The Fifth Circuit has held that Blum and Hensley "did not abrogate the requirement that district courts must consider the twelve factors set down in Johnson." Brantley v. Surles, 804 F.2d 321, 325 (1986). The court has reversed an award of attorney's fees based on a "lodestar" calculation because "the district court did not evaluate specifically the applicability of each of the Johnson factors." Nisby v. Commissioners Court of Johnson County, 798 F.2d 134, 137 (1986). However, in

another decision this strict Johnson rule was not applied, Brantley v. Surles, supra, and in at least one opinion the court appeared to apply the "similar skill" rule, Sims v. Jefferson Downs Racing Association, 778 F.2d 1068, 1084 (1985). The circuit recently remanded an attorney fee issue to a district court to "make of this muddle what it can." Bhandari v. First National Bank of Commerce, 808 F.2d at 1105.

A shared characteristic of the "billing rate," "similar skill," "contingency," and "Johnson" rules which the courts have applied after Blum and Hensley is that the rules seek to apply market rates for civil rights cases comparable to rates in other types of

equally complex Federal litigation.[13] Recently, the Eleventh Circuit has disagreed by adopting a "narrow market" rule. The court approved the payment of an hourly rate to a plaintiff's attorney which was lower than the rate which that attorney "normally" charged when defending management clients in Title VII cases. The court approved a "narrow market" rule focused on the "market" for plaintiffs' attorneys because although "it might be reasonable to charge a management client $120 an hour in a Title VII case, the same lawyer would charge an individual Title VII plaintiff $75 an

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[13] In so doing the circuits are following the congressional mandate that "the amount of fees awarded ... be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases...." S. Rep. No. 94-1011, p. 6 (1976), quoted in Hensley, 461 U.S. at 430 n. 4.

hour because the individual would not likely be able to bear the expense of a loss if a significantly higher rate were charged." Mayson v. Pierce, 806 F.2d at 1557.

Although in part a market-based rule, the Mayson standard like the one in Coulter will serve to drive experienced attorneys away from the representation of civil rights grievants. In effect, the Eleventh Circuit has ruled that courts should issue smaller fee awards for lawyers with poor clients than for lawyers with wealthy clients. The fee statutes were intended to remove this type of financial barrier to the judicial process. In any event, the confusion caused by the conflicts between the "competent attorney" rule of the Sixth Circuit and the market-based rules of the

other circuits and among the five market-based rules requires this Court's attention.

B. Compensable Hours.

Unlike the multifaceted conflict among the circuits over the proper calculation of a reasonable hourly rate, the conflict between the Sixth Circuit's decision in Coulter and the other circuits over the determination of compensable hours is one-dimensional. The Sixth Circuit adopted a fixed-percentage rule that "[i]n the absence of unusual circumstances" a plaintiff's attorney may be compensated for litigating the attorney's fee issue for hours which do "not exceed 3% of the hours in the main case when the issue is submitted on the papers [or] 5% of the hours in the main case when a trial is

necessary." App. 23a-24a. Every other appellate court which has considered the issue has rejected any different treatment for the compensation of an attorney's time spent litigating the entitlement to attorney's fees.

The adoption of an arbitrary rule like the Coulter rule for limiting compensation for fee litigation has been rejected by the other circuits because such a rule plainly conflicts with the purpose of providing attorney's fees to prevailing parties. If attorneys are not compensated for time spent on fee litigation they "may become wary about taking Title VII cases...." Prandini v. National Tea Co., 585 F.2d 47, 54 (3d Cir. 1978). "It should be inconsistent with the purpose of the Fees Act to dilute a fees award by refusing to

compensate the attorney for the time reasonably spent in establishing and negotiating his rightful claim to the fee." Lund v. Affleck, 587 F.2d 75, 77 (1st Cir. 1978). The Fifth, Seventh, Eighth and Ninth Circuits explicitly rely upon the rule announced in Lund that time devoted to collecting fees must be compensated for in the same manner as time spent on other issues. Johnson v. State of Mississippi, 606 F.2d 635, 638 (5th Cir. 1979); Lovell v. City of Kankakee, 783 F.2d 95, 97 (7th Cir. 1986); Jones v. MacMillan Bloedel Containers, Inc., 685 F.2d 236, 239 (8th Cir. 1982); Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1126 (9th Cir. 1981).

Until the decision in Coulter, the appellate courts have uniformly

determined that the district court's "discretion [for awarding compensation for fee litigation] must be exercised in light of the same considerations that affect the lodestar determination." Black Grievance Committee v. Philadelphia Electric Co., 802 F.2d at 657; see also, In re Nucorp Energy, Inc., 764 F.2d 655, 660 (9th Cir. 1985). The Coulter rule limiting the number of compensable hours by an arbitrary percentage figure is in direct conflict with calculation of fees by the other circuits.

II. THE SIXTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S STANDARDS FOR DETERMINING "REASONABLE" ATTORNEY'S FEES AND RAISES IMPORTANT QUESTIONS FOR THE APPLICATION OF MORE THAN 100 STATUTES PROVIDING FOR ATTORNEY'S FEES TO PREVAILING PARTIES.

By rejecting this Court's lodestar

method[14] for calculating attorney's fees, the Sixth Circuit in Coulter undermines "[t]he purpose of [the fee provision] to ensure 'effective access to the judicial process' for persons with civil rights grievances." Hensley v. Eckerhart, 461 U.S. at 429, quoting H.R. Rep. No. 94-1558, p. 1 (1976). The proper implementation of the lodestar approach depends upon the (1) application of a "market rate" for services, (2) compensation for "reasonably expended" hours, (3) use of objective and readily ascertainable evidence, and (4) the

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[14] "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley, 461 U.S. at 433. "This figure, commonly referred to as the 'lodestar,' is presumed to be the reasonable fee...." City of Riverside v. Rivera, 91 L. Ed. 2d at 476.

inclusion of the relevant factors for determining reasonable fees. The Coulter decision conflicts with each of these four principles.

1. In order to assure "effective access" to the judicial process the Court determined that reasonable attorney's fees "are to be calculated according to the prevailing market rate." Blum v. Stenson, 465 U.S. at 895.[15] By holding that an hourly rate should be set without regard to the particular skill and

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15 "As nearly as possible, market standards should prevail, for that is the best way of ensuring that competent counsel will be available to all persons with bona fide civil rights claims. This means that judges awarding fees must make certain that attorneys are paid by the full market value that their efforts would receive on the open market in non-civil-rights cases...." (Emphasis added), Hensley, 461 U.S. at 447 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., concurring in part and dissenting in part).

experience of the lawyer requesting fees and to limit compensable hours by a flat percentage figure, the Sixth Circuit fails to provide compensation at a full market rate.

If as determined by the Sixth Circuit, fee awards do not compensate experienced attorneys at the rates which their experience commands in the market place, lawyers in civil rights cases will increasingly be inexperienced or less competent. Less effective representation will ill-serve the victims of illegal discrimination and may overburden the courts with inefficiently presented litigation.

The greater the experience and skill of an attorney the greater the potential loss in compensation in the representation of civil rights

plaintiffs. The Sixth Circuit "competent attorney" rule either discourages the experienced attorneys from championing civil rights plaintiffs or directs those attorneys to take cases within the circuits which recognize the market value for their services.[16]

Moreover, the Coulter rule discourages efficient litigation. If an experienced attorney such as Belton

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[16] The Coulter rule is a greater disincentive for lawyers to take a civil rights case than the proportionality rule rejected by the Court for that reason in City of Riverside v. Rivera. At least with the proportionality rule there is the potential for a recovery in excess of normal billing rates. A plaintiff may recover a significant sum which, if the attorney received a contingency fee, might result in an effective hourly rate in excess of the attorney's customary billing rate. But the Coulter rule provides no opportunity for an enhanced billing rate -- only the possibility that a court would order compensation according to a reduced hourly billing rate.

guides a novice such as Ms. Arthur through the development of a case, he risks the court determining, as the Coulter court did, that the junior attorney could have done the case alone. Under the Coulter rule it is not in the economic interest of a senior attorney to agree to assist a junior attorney or to associate a junior attorney on a case. The senior attorney is better advised to proceed alone in order that the court may not point to the work of some more junior lawyer as a basis for reducing the hourly rate. By departing from the market-rate approach the Sixth Circuit has created anomalous economic incentives which spur an attorney to make rational economic decisions for himself which contradict the efficient operation of litigation.

2. Equally as important to the

application of "the full market rate" for ensuring the availability of effective counsel is the assurance that a prevailing plaintiff's attorneys "[n]ormally [will receive compensation for] all hours reasonably expended on the litigation...." Hensley, 461 U.S. at 435. Rather than following this "normal" rule of full compensation, the Sixth Circuit created a presumption that, as a general matter, attorneys will not be compensated for all their hours which they spend litigating an entitlement to fees.

> In the absence of unusual circumstances, the hours allowed for preparing and litigating the attorney fee case should not exceed 3% of the hours in the main case when the issue is submitted on the papers without a trial and should not exceed 5% of the hours in the main case when a trial is necessary.

App. 23a-24a. The Sixth Circuit provided no analytical justification for establishing the cut off at 3% or 5%. However, the appellate court was forthright in stating that the motivation for this rule was the "obvious inadequacy in the 'lodestar' method of calculations" App. 10a -- an unusual lower court criticism of a recently adopted Supreme

Court standard.[17]

The Sixth Circuit's arbitrary 3% rule limiting a plaintiff's attorney's compensable hours creates a substantial obstacle in the way of lawyers seeking fees and will make it "less likely lawyers will [agree] to undertake the risk of representing civil rights plaintiffs...." Hensley, 461 U.S. at 456

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[17] During the 13 hours which he spent preparing his fee request Professor Belton obtained or developed the evidence supporting the request for fees, six affidavits from other attorneys and his own affidavit and list of hours, memorandum in support of the request, and a motion for judicial notice. The defendants prepared a twenty-page "Response" to the request. Sixth Circuit App. 176-95. Unless an arbitrary standard -- such as the 3% rule -- is used, it is difficult to justify a conclusion that Belton requested compensation for an "excessive" number of hours.

(Brennan, et al., JJ).[18] "[I]f attorneys are required to litigate for their fees but are not compensated for the time spent on such litigation, their effective rates will be reduced correspondingly. Attorneys may become wary about taking Title VII cases, civil rights cases, or other cases for which attorneys fees are statutorily authorized." Pawlak v. Greenawald, 713 F.2d at 973.

3. By establishing the lodestar approach to the determination of attorney's fees the Court intended to

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[18] The Court observed in Hensley, 461 U.S. at 430 that the Senate Report for the Civil Rights ATtorney's Fees Awards Act of 1976, S. Rep. No. 94-1011, p. 6 (1976), refers to three district court cases which correctly determined an award of reasonable fees. In one of these decisions, Stanford Daily v. Zurcher, 64 F.R.D. 680, 683-84 (N.D. Cal. 1974), the court ruled that the refusal to award fees for services related to collection would improperly dilute the initial award.

limit the extent of litigation over fee claims and to encourage the settlement of such claims. Hensley, 461 U.S. at 437; Blum, 465 U.S. at 902 n. 19. The Hensley, lodestar approach "provides an objective basis on which to make an initial estimate of the value of a lawyer's services." 461 U.S. at 433. Reliance on an objective and predictable standard which depends on easily available evidence serves the twin goals of limiting litigation and promoting settlement.[19]

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[19] On the other hand, the Court rejected the adoption of the twelve-factor analysis for determining fees initially set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), because it "gave very little actual guidance" to lower courts" and by "[s]etting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." Pennsylvania v. Delaware Valley Citizens, 92 L.Ed.2d at 455.

However, the Sixth Circuit rejected the objectivity and discipline gained by a reliance on the market place. The Sixth Circuit's "competent" attorney rule depends not upon objective evidence but on a court's subjective assessment made at the end of a trial that a less senior or experienced attorney could have successfully litigated the case. If the court so finds, it may then pay one attorney, who successfully prosecuted the action, at the market rate of some other attorney who, as in Coulter, is significantly less experienced and skilled. The Sixth Circuit's approach is an invitation to subjective retrospective judgments which can only lead to widely disparate fee awards.

The Sixth Circuit standard for awarding reasonable attorney's fees

raises the subjectivity and lowers the predictability of the process and thus complicates fee litigation and lessens settlement opportunities. The lower court's standard creates an "artificial, judge-made doctrine" which relies upon subjective assessments and replaces the "straightforward command" for reasonable fees with "a Frankenstein's monster ... leaving waste and confusion (not to mention circuit splits) in its wake [and] increases the delay, uncertainty, and expense of bringing a civil rights case...." Hensley, 461 U.S. at 455-56 (Brennan, et al., JJ.)

4. The Sixth Circuit opinion conflicts with the basic premise of the Court's standard that the lodestar is presumed to be the reasonable fee because that "figure includes most, if not all,

of the relevant factors comprising a 'reasonable' attorney's fee...." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 92 L. Ed. 2d at 457.[20] But the Coulter "competent attorney" rule does not include consideration for the "skill" or "experience" of the plaintiff's attorney. Nor does the Coulter flat percentage rule limiting compensable hours account for the "novelty" or "complexity" of issues.

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[20] For example, since "[t]he special skill and experience of counsel should be reflected in the reasonableness of the hourly rate" and "[t]he novelty and complexity of the issues presumably [are] fully reflected in the number of billable hours," it is not appropriate as a general matter to consider these factors when "determining whether to increase the basic fee award." Blum v. Stenson, 465 U.S. at 898; see also, Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 92 L. Ed. 2d at 456.

If, for example, the "lodestar" hourly rate is pegged at the market rate for the services of a highly skilled attorney then "it is unnecessary to enhance the fee for superior performance...." Pennsylvania v. Delaware Valley Citizens Council, 92 L.Ed.2d at 457. But the Coulter rule does not set the hourly rate at the market value for the services of a highly skilled lawyer. Without an enhancement of the hourly rate there is no adequate compensation for the services of a highly skilled attorney under the Coulter rule.[21]

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[21] Other lower courts understand the relationship of the proper lodestar calculation with a limitation on the consideration of factors for enhancement. For example, the First Circuit interpreted Blum as providing "that 'quality of representation' is generally reflected in the reasonable hourly rate" but that "skill and experience as a

III. THE SIXTH CIRCUIT FAILED TO PROVIDE THE NECESSARY CAREFUL REVIEW OF ATTORNEY'S FEES DECISIONS REQUIRED BY HENSLEY AND BLUM.

While indicating that "[a] request for attorney's fees should not result in a second major litigation," the Court has stressed that it "remains important ... for the district court to provide a concise but clear explanation of its reasons for the fee award" in order that the appellate courts may ensure that the awards are consistent with the important purposes of the fee statutes. Hensley v. Eckerhart, 461 U.S. at 437. Accordingly, even though the lower court "findings [in Hensley] represent[ed] a commendable

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litigator are [the plaintiff's lawyer] stock-in-trade and [the lawyer should be] paid his ... price." Wildman v. Lerner Stores Corp., 771 F.2d at 610-11; see also, Daly v. Hill, 790 F.2d 1071, 1078 (4th Cir. 1986); Brantley v. Surles, 804 F.2d at 325.

effort to explain the fee award," the Supreme Court remanded the issue of reasonable fees for further consideration and possible findings. 461 U.S. at 438. In Blum the Court held that the conclusory statements of the lower courts were inadequate to support the award of fees. 465 U.S. at 898.

In approving the refusal to compensate Belton for more than 20% of his time, the Sixth Circuit failed to exercise proper appellate review of the conclusory findings of the lower court. For example, the lower court ruled that the number of hours for which compensation was sought was "unreasonable," that an "inordinate" time was spent on "a simple lawsuit," and that 50% of the hours requested for trial preparation was "sufficient time." The

Sixth Circuit affirmed the lower court because it did not "exercise [its] discretion and expertise on this mixed question of law and fact in an arbitrary or unfair way." App. 27a.

The lower court's exercise of discretion does not pass muster simply because the court did not act arbitrarily or unfairly. The appellate court must insure that the district court exercised its discretion "'in light of the large objectives'" of the fee statutes because "when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with these purposes and not 'equity [which] varies like the Chancellor's foot.'" Albemarle Paper Co. v. Moody, 422 U.S. at 417 (citations and

footnote omitted). A court's reliance on conclusory statements to deny compensation for a significant portion of the time expended by a plaintiff's attorney thwarts the purpose of the fee-shifting statutes "to ensure effective access to the judicial process,'" Hensley, 461 U.S. at 429. Appellate courts must review district court awards more closely than did the Sixth Circuit in Coulter, in order to assure that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." Id. at 435.

If the Coulter decision stands a lower court may simply render an incantation that the time for which an attorney requests compensation was "unreasonable" or "inordinate" in order to reduce significantly the award. This Court did not permit a lower court to increase a fee-award by asserting conclusory reasons, such as the "far reaching significance [of the relief] to a large class of people" or the "novelty" or "complexity" of the litigation. Blum v. Stenson, 465 U.S. at 898. Similarly, lower courts should not be permitted as the Coulter court did to reduce awards by equally conclusory statements.[22]

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[22] The failure of the appellate court to require a more careful analysis and findings from the district court is emphasized by the fact that, as this Court found with respect to another district court's findings in another Title VII case, Bazemore v. Friday, 92 L.

Ed. 2d 315, 333 n.15 (1986), "certain conclusions of the District Court are inexplicable in light of the record."

First, on three occasions the lower court stated that Coulter "was a simple case," App. 43a, 45a-46a, but failed to explain this conclusion in light of several undisputed facts: (a) the EEOC found that an "[e]xamination of the evidence indicates there is not reasonable cause to believe" that Coulter's charge of discrimination was true, Sixth Circuit App. 117; (b) Tennessee maintained that it had not discriminated against Coulter through trial; and (c) Coulter had to prove that she was denied a promotion because of intentional gender discrimination based solely upon circumstantial evidence since there was no "smoking gun" evidence.

Second, the district determined that "Mr. Belton does not have any more ability as far as trial of this type of case is concerned than Mrs. Arthur" despite the indisputably far greater experience of Belton than Arthur. Third, the lower court stated that "[t]his is not a paper lawsuit," App. 45a, even though the plaintiff did not present a single trial witness but rather relied upon documents, stipulations, exhibits and a pre-trial brief, which Mr. Belton prepared.

Fourth, the lower court

The decisions of other circuits stand in strong contrast to the failure of the Sixth Circuit in Coulter to evaluate whether the district court properly exercised its discretion consistent with the purposes of the fee statutes. The Third Circuit reversed a district court decision similar to the decision in Coulter because "the findings of the district court purporting to justify a reduction in the fee request are not specific and lack the evidentiary basis to counter the uncontradicted affidavit of plaintiff's counsel detailing the hours expended and the

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asserted that some of Mr. Belton's hours "must be duplicates," App. 45a, of Ms. Arthur's hours, despite the fact that no list of Ms. Arthur's hours or itemization of her services was even presented to the district court. Fifth, the lower court failed to evaluate the substantial evidence submitted by Mr. Belton on the market rate for attorneys.

billing rate." Cunningham v. City of McKeesport, 807 F.2d 49, 52 (3d Cir. 1986). The Seventh Circuit concluded that it "cannot sustain a substantial award of attorney's fees on the basis of so skimpy an opinion as [the] district court wrote." Lenard v. Argento, 808 F.2d at 1247; see also, Nisby v. Commissioners Court of Johnson County, 798 F.2d at 137.

CONCLUSION

In order to resolve conflicts between the circuits on important issues regarding the implementation of fee-shifting statutes, to correct a serious misapplication of this Court's standards for establishing reasonable fees, and to provide guidance about the proper measure of a "reasonable hourly rate," the Court should grant the

petition for a writ of certiorari to review the judgment of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

INDEX

No. 85-5109

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARY LUCILLE COULTER,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	O R D E R
	)	
STATE OF TENNESSEE, et al.,	)	
	)	
Defendants-Appellees.	)	
	)	
	)	

BEFORE: LIVELY, Chief Judge, MERRITT and WELLFORD, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been

referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 85-5109

MARY LUCILLE COULTER,

Plaintiff-Appellant,

v.

STATE OF TENNESSEE, et al.,

Defendants-Appellees.

Before: LIVELY, Chief Judge; MERRITT and WELLFORD, Circuit Judges.

J U D G M E N T

ON APPEAL from the United States District Court for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed in part, reversed in part and the case is remanded for further proceedings consistent with this opinion.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/
Clerk

MARY LUCILLE COULTER

Plaintiff-Appellant,

v.

STATE OF TENNESSEE; Department of Transportation of the State of Tennessee, Department of Personnel of the State of Tennessee; and Darrell D. Akins, Commissioner of the Department of Personnel,

Defendants-Appellees.

No. 85-5109.

United States Court of Appeals, Sixth Circuit

Argued Jan. 17, 1986.

Decided Oct. 29, 1986.

Before LIVELY, Chief Judge, and MERRITT and WELLFORD, Circuit Judges.

MERRITT, Circuit Judge.

This is an attorney fee appeal arising from a Title VII case. Robert Belton, a Vanderbilt University law

professor who teaches in the employment discrimination field, was associated by another lawyer as co-counsel for a plaintiff who ultimately won her case. Mr. Belton challenges the District Court's order reducing his separate attorney fee award against the losing defendants from $22,532 to $14,167. The appeal raises significant issues respecting the applicable hourly rate to be used under the "lodestar" approach to attorney's fees[1] and the approach to be

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[1] The rate-times-hours method of calculation, often referred to as the "lodestar" method, has been approved, in modified form, though not mandated, by the Supreme Court. See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, ___ U.S. ___, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986); Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983); Northcross v. Board of Education, 611 F.2d 624, 636 (6th Cir. 1979). See also Report of Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237 (1985), for criticism of this method and

followed in measuring excessive hours.

FACTUAL BACKGROUND

Aleta Arthur and Robert Belton represented plaintiff Coulter in a Title VII sex discrimination suit against the State of Tennessee and certain Tennessee agencies and officials. District Judge Morton ruled in favor of plaintiff on the issue of liability. The parties by agreement then submitted a consent order which disposed of all the remedial issues, awarded plaintiff a promotion and a small amount of compensation, awarded Ms. Arthur $13,621.25 in attorney's fees at the rate of $85 an hour, and reserved the question of attorney's fees due Mr. Belton for later determination.

Mr. Belton subsequently petitioned the District Court for an attorney fee

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recommendations for improvement.

award of $22,532.90 calculated on a total of 185.59 hours worked at rates of $110 per hour for services rendered during 1982 (4.25 hours) and at $125 per hour for 1983 (60.92 hours) and 1984 (120.42 hours). Judge Morton reduced the hourly rate to $85 for 1982 and $110 for 1983 and 1984, and he refused to award Mr. Belton a fee for 55.83 hours, which he considered unreasonably expended. Taking these reductions into account, Judge Morton ordered the defendants to pay Mr. Belton attorney's fees in the amount of $14,167.35. Judge Morton found that Ms. Arthur was the "lead" lawyer, a seasoned and effective trial lawyer, who conducted all of the trial and all the deposition examinations. Mr. Belton assisted in legal research and conceptualization of the case and in the review of documents

and preparation of court papers. Judge Morton characterized the case as "simple," "tried in less than half a day," and "decided from the bench."

HOURLY RATES

In adopting some 131 attorney fee shifting statutes,[2] including the civil rights statute applicable here, 42 U.S.C. § 2000e-5(k) (1982) (awarding "reasonable" fees to prevailing parties in the "discretion" of the court), Congress intended to provide an economic incentive for the legal profession to try meritorious cases defining and enforcing statutory policies and constitutional rights in a variety of fields of legal practice. Congress did not intend that lawyers, already a relatively well off

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[2] 9 Att'y Fee Awards Reporter 2-3 (1986) (See Appendix A).

professional class, receive excess compensation or incentives beyond the amount necessary to cause competent legal work to be performed in these fields. Legislative history speaks of "fees which are adequate to attract competent counsel, but which do not produce windfalls," S.Rep. No. 94-1011, p. 6 (1976), U.S. Code Cong. & Admin. News 1976, pp. 5908, 5913, and cautions against allowing the statute to be used as a "relief fund for lawyers," 122 Cong. Rec. 33314 (1976) (remarks of Sen. Kennedy).[3] The statutes use the words

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[3] These quotations are from the legislative history of 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act of 1976. However, this provision was patterned in part on Title VII's attorney fee provision, which is involved in this case. See Hensley v. Eckerhart, 461 U.S. 424, 433 n. 7, 103 S.Ct. 1933, 1939 n. 7, 76 L.Ed.2d 40 (1983); Hanrahan v. Hampton, 446 U.S. 754, 758 n. 4, 100 S.Ct. 1987, 1989 n. 4, 64 L.Ed. 2d 670

"reasonable" fees, not "liberal" fees. Such fees are different from the prices charged to well-to-do clients by the most noted lawyers and renowned firms in a region. Under these statutes a renowned lawyer who customarily receives $250 an hour in a field in which competent and experienced lawyers in the region normally receive $85 an hour should be compensated at the lower rate.[4] We

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(1980). We consider the legislative history of § 1988 to be indicative of congressional intent relative to § 2000e-5(k). For further discussion of this legislative history, see Hensley v. Eckerhart, 461 U.S. at 429-30, 444-46, 103 S.Ct. at 1945-46.

[4] "These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal

therefore apply the principle that hourly rate for fee awards should not exceed the market rates necessary to encourage competent lawyers to undertake the

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laws. Hence, if plaintiffs, such as Delaware Valley, find it possible to engage a lawyer based on the statutory assurance that he will be paid a "reasonable fee," the purpose behind the fee-sharing statute has been satisfied.

Moreover, when an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance. In short, the lodestar figure includes most, if not all, of the relevant factors comprising a "reasonable" attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance." Pennsylvania v. Delaware Valley Citizen's Council, supra, n. 1, 106 S.Ct. at 3098-99.

representation in question.

Mr. Belton requested that his fee be calculated on an hourly rate of $100 per hour for services rendered in 1982 and $125 per hour in 1983 and 1984. Judge Morton reduced the hourly rates to $85 for 1982 and $110 for 1983 and 1984 as reasonably reflecting the prevailing market rates for lawyers in this field in Nashville, Tennessee, the community in which both Mr. Belton and Ms. Arthur practice.

This finding is supported by the fact that Mr. Belton requested and was awarded fees based on an $85 rate for services rendered in 1982 in another Title VII action before Judge Morton. Perkins v. State Board of Education, No. 77-3552 (M.D. Tenn. March 11, 1983) [available on WESTLAW, DCTU database].

Mr. Belton argues that his hourly rate was low in Perkins because Perkins was decided before the Supreme Court's decision in Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), and did not use the "market rate" theory the Court espoused in Blum. In Blum the Court rejected the argument that attorney fee awards for nonprofit counsel should be calculated in a cost-based method and should be lower than fees calculated under a market rate theory for private "for profit" counsel.

Mr. Belton's argument implies that his fees in Perkins were lower because they reflected his lower cost of practicing law resulting from his free access to office space and law library resources at Vanderbilt Law School.

This argument is not valid. In an

earlier opinion in Perkins, Judge Morton did note the argument that Mr. Belton's fee should be lower because he was a law professor, but the judge awarded fees "based on prevailing rates in the area." "It is true," he said, "that one of the underlying factors in setting the rate may be overhead, but to the recipient thereof the components have no pertinency. The plaintiff is entitled to recover fees based on their reasonable worth, i.e., market value." Perkins v. State Board of Education, No. 77-3552 slip op. at 3-4 (M.D. Tenn. Nov. 4, 1980). The text of Judge Morton's orders undermines Mr. Belton's assertion that his fee was not calculated based on market rate as required by Blum. In addition, in Perkins Judge Morton awarded Richard Manson, a Nashville attorney in

private practice, a fee calculated at a rate of $75 per hour for 1982.

The reduction in Mr. Belton's rates is also supported by the fact that in this case Ms. Arthur requested an attorney fee calculated at the rate of $85 per hour for all three years. The parties agree that under the consent order Ms. Arthur was paid $85 per hour for all of the work she did. Mr. Belton argues that this reference to Ms. Arthur's rate constitutes the admission of a "settlement ... to reduce the amount of a claim" in contravention of Rule 408 of the Federal Rules of Evidence. Belton's Brief at 18-19. Rule 408 does prohibit the admission of "[e]vidence of ... accepting ... valuable consideration in compromising ... a claim which was disputed as to either validity or amount,

... to prove liability for or invalidity of the claim or its amount." However, the rule allows the admission of such evidence for other purposes. In this case, reference to the settlement is for the statistical purpose of establishing the market rate prevailing in Nashville for the sort of legal services rendered by Mr. Belton. Laying the settlement aside, record evidence establishes that Ms. Arthur, described by Judge Morton as an "excellent" and highly effective trial lawyer in Nashville, sought $85 per hour for her services in the same Title VII case. The reduced figures reasonably reflect the market rate in Nashville at the time the services were rendered, the rates necessary to hire competent lawyer to undertake the work in question in accordance with the principle stated

above that "fee awards should not exceed the market rates necessary to encourage competent lawyers to undertake the representation in question."

HOURS EXPENDED

The second issue -- the reasonableness of the hours claimed by Mr. Belton -- illustrates an obvious inadequacy in the "lodestar" method of calculation. The rates-times-hours approach is a sufficient standard when there is no problem about the hours of service performed, but it does not solve the problem of excessive hours. See Report of Third Circuit Task Force, 108 F.R.D. 237, 247-49 (1985). Hours spent in court and at depositions can be verified and reviewed. Hours spent in reviewing records, talking to other lawyers or experts, preparing legal

documents and the like cannot be fully verified and require the court to trust the lawyer's word that the hours claimed represent necessary work actually performed. Depending on the situation, the lawyer may have strong economic incentives to spend too many hours on a piece of work or to exaggerate the number of hours spent or the necessity or importance of the work. Similarly, it is often difficult to assess the need for two lawyers at a deposition, an interview, or a trial.

Mr. Belton requested fees for 185.59 hours. Judge Morton cut out 55 hours. The District Judge eliminated as excessive or unnecessary 8 of the 13 hours claimed for preparing his fee request; all of the 16.75 hours claimed for preparing, filing, and arguing what

the District Judge characterized as a "futile" summary judgment motion; 22 of the 44 hours in preparing the stipulations and the pretrial brief; and 9 of 18 hours claimed for trial preparation.

Three very different kinds of issues can arise concerning excessive hours: (1) factual questions about whether the lawyer actually worked the hours claimed or is padding the account; (2) legal questions about whether the work performed is sufficiently related to the points on which the client prevailed as to be compensable; and (3) mixed questions about whether the lawyer used poor judgment in spending too many hours on some part of the case or by unnecessarily duplicating the work of co-counsel. On the first type of factual

question we apply the clearly erroneous standard. On the second we determine whether the District Court erred. On the third concerning billing judgment we look to see whether the District Court, based on experience and the record in the case, misapplied the reasonable billing practices of the profession.

On the question of excessive hours we have three issues, none of which involve a question of padding, misrepresentation, or dishonest accounting. The first question involves the time spent in preparing and presenting the attorney fee petition and accompanying documentation after the civil rights case was over. The second involves preparation of the summary judgment motion. Both raise legal questions of compensability. The third

involves the preparation of documents and raises a question of billing judgment.

Preparation of Fee Application.-- Although time spent in preparing, presenting, and trying attorney fee applications is compensable; some guidelines and limitations must be placed on the size of these fees. Otherwise the prospect of large fees later on may discourage early settlement of cases by rewarding protracted litigation of both the civil rights case and the attorney fee case.

The cases from this and other circuits uniformly hold that a lawyer should receive a fee for preparing and successfully litigating the attorney fee case after the original case is over, although in the private market place, lawyers do not usually charge, and

clients do not usually pay, for the time it takes lawyers to calculate their fees. See cases collected and discussed in In re Nucorp Energy, Inc., 764 F.2d 655, 660 (9th Cir. 1985). The legislative intent behind attorney fee statutes, however, was to encourage lawyers to bring successful civil rights cases, not successful attorney fee cases. The attorney fee case is not the case Congress expressed its intent to encourage; and in order to be included, it must ride piggyback on the civil rights case.

Judge Morton struck the right balance. He limited these hours to approximately 3% of the hours allowed in the main case. In the absence of unusual circumstances, the hours allowed for preparing and litigating the attorney fee

case should not exceed 3% of the hours in the main case when the issue is submitted on the papers without a trial and should not exceed 5% of the hours in the main case when a trial is necessary. Such guidelines and limitations are necessary to insure that the compensation from the attorney fee case will not be out of proportion to the main case and encourage protracted litigation.

Summary Judgment Motion. -- On summary judgment motions and other similar motions that go to a particular issue in a case, the question should be whether the person seeking compensation prevailed on the motion or in the end prevailed on the issue raised in the motion in part as a result of the motion. This particular summary judgment motion advanced Mr. Belton's case and was a

factor in winning. His summary judgment motion showed that his client had made out a prima facie employment discrimination case and that the state had failed to plead or otherwise come forward with a valid reason for the failure to promote the plaintiff as rebuttal to the prima facie case. As a result of the motion the state amended its pleading to allege a justification, and Ms. Arthur and Mr. Belton were then able to show that the justification the state advanced was a pretext. Thus, Mr. Belton's summary judgment motion narrowed the issue in the case and helped his client win at the trial. The 16 hours or 2 days Mr. Belton spent on this motion should be allowed.

Preparation of Stipulations, Pretrial Brief, and for Trial. -- When the issue is a question of the lawyer's judgment in billing for a particular number of hours on a piece of work, we must depend in larger measure on the fairness of the District Court in assessing the needs of the case. Under the circumstances presented here, we do not believe the District Court acted arbitrarily or irrationally in reducing the pretrial preparation hours from 62 to 31. Ms. Arthur was lead trial counsel and conducted the trial itself. Mr. Belton prepared extensive stipulations of fact, based in major part on answers to previous interrogatories he had prepared, and an able trial brief. His conceptualization of the case and his stipulations and brief contributed to a

successful outcome, but we defer to the view of the trial judge that 31 hours or approximately 4 working days was sufficient for these tasks. Judges will differ on questions of this kind, but our own experience as lawyers and judges tells us that the District Judge has not exercised his discretion and expertise on this mixed question of law and fact in an arbitrary or unfair way. Judge Morton gave Mr. Belton credit for all of the more than 3 days time he spent at the depositions and short trial conducted altogether by Ms. Arthur. He did so on the theory that multiple representation can be productive. But there is also the danger of duplication, a waste of resources which is difficult to measure. Where duplication of effort is a serious problem, as in this case, the District

Court may have to make across the board reductions by reducing certain items by a percentage figure, as Judge Morton did here in reducing this item by 50%.

Accordingly, the decisions of the District Court as to the hourly rate and the hours allowed for the preparation of the attorney fee case and the pretrial stipulations and brief are affirmed. The decision on the hours allowed on the motion for summary judgment is reversed and the case remanded to the District Court to recalculate the fees to include these hours.

WELLFORD, Circuit Judge, concurring in part and dissenting in part.

I agree with Judge Merritt's well considered opinion with respect to all aspects of this fee controversy except with that part dealing with the summary

judgment motion. (Page 151.) Judge Morton had first hand opportunity to consider the role and significance of this motion in making his ruling. In my judgment, it had little to do with the final outcome except perhaps to "narrow the issue in the case" as found by Judge Merritt. I would therefore on remand to the district court allow that court to determine on further consideration what portion of the hours spent on the summary judgment should be allowed to Mr. Belton for his services after taking into account the rationale expressed by this court herein.

APPENDIX A

Federal Statutes Authorizing the Award of Attorney Fees

Act to Prevent Pollution from Ships, 3 U.S.C. § 1910(d)

Age Discrimination Act of 1975 (as amended by Pub.L. 95-478, § 401) U.S.C. § 6104(e)

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b)

Agricultural Unfair Trade Practices, 7 U.S.C. § 2305(a), (c)

Alaska Native Claims Settlement Act, 43 U.S.C. § 1619

Alien Owners of Land, 48 U.S.C. § 1506

Atomic Energy Act of 1954, 42 U.S.C. § 2184

Bank Holding Company Act, 12 U.S.C. § 1975

Bankruptcy Act, 1 U.S.C. §§ 109, 205(c)(12), 632, 641, 642, 643, 644, 1975

Bankruptcy Reform Act (Pub.L. 95-598), 11 U.S.C. §§ 303(i), 330(a), 363(n), 503(b)

Black Lung Benefits Act, 30 U.S.C. § 932(a)

Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000a-3(b)

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(k)

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988

Civil Service Reform Act of 1978 (Pub.L. 95-454, §§ 205, 702), 5 U.S.C. §§ 5596(b)(1), 7701(g)

Clayton Act, 15 U.S.C. § 15

Clean Air Act (as amended by Pub.L. 95-95), 42 U.S.C. §§ 7413(b), 7604(d), 7607(f), 7622(b)(2)(B), (e)(2)

Coal Mine Safety Act, 30 U.S.C.S § 938(c)

Coast Guard Act, 14 U.S.C. § 431(c)

Commodity Futures Trading Commission Act of 1974, 7 U.S.C. § 18(f), (g)

Communications Act of 1934, 47 U.S.C. §§ 206, 407

Condominium and Cooperative Abuse Relief Act of 1980, 15 U.S.C. §§ 3608(d), 3609, 3611

Consumer Leasing Act, 15 U.S.C. § 1667b(a)

Consumer Product Safety Act, 15 U.S.C. §§ 2060(c), 2060(f), 2072(a), 2073

Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq.

Copyright Act, 17 U.S.C. § 505

Counsel's Liability for Excessive Costs, 28 U.S.C. § 1927

Criminal Code, 18 U.S.C. §§ 3006A(d), 3495

Deep Seabed Hard Mineral Resources Act 30 U.S.C. § 1427(c)

Deepwater Ports Act, 33 U.S.C. § 1515(d)

Economic Opportunity Act of 1964, 42 U.S.C § 2701 et seq.

Electronic Fund Transfer Act (Pub.L. 95-630, Title XX), 15 U.S.C. § 1693m(a), (f)

Employee Retirement Income Security Act, 29 U.S.C. § 1132(g)

Endangered Species Act, 16 U.S.C § 1540(g)(4)

Energy Policy and Conservation Act, 42 U.S.C. § 6305(d)

Energy Reorganization Act of 1974 (as amended by Pub.L. 95-601), 42 U.S.C. §§ 5851(b)(2)(B), (e)(2)

Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412

Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d)

Ethics in Government Act of 1978 (Pub.L. 95-521, § 710(d)), 2 U.S.C. § 1692k

Fair Credit Reporting Act, 15 U.S.C. §§ 1681n, o

Fair Debt Collection Practices Act (Pub.L. 95-109, § 813-(a)), 15 U.S.C. § 1692k

Fair Housing Act of 1968, 42 U.S.C. § 3612(c)

Fair Labor Standards Act, 29 U.S.C. § 216(b)

Federal Contested Electron Act, 2 U.S.C. § 396

Federal Credit Union Act, 12 U.S.C. § 1786(o)

Federal Deposit Insurance Act, 12 U.S.C. § 1818(n)

Federal Employment Compensation for Work Injuries, 5 U.S.C. § 8127

Federal Mine Safety and Health Act, 30 U.S.C. § 815(c)(3) (added by Pub.L. 95-164), 30 U.S.C. § 938(c)

Federal Power Act (as amended by Pub.L. 95-617, § 212), 16 U.S.C. § 825o1-(b)(2)

Federal Rules of Appellate Procedure, App. Rule 38 (28 U.S.C.)

Federal Rules of Civil Procedure, App. Rules 37, 56(g), (28 U.S.C.)

Federal Trade Commission Improvement Act, 15 U.S.C. §§ 57a(h)(1)

Federal Water Pollution Control Act Amendment of 1972, 33 U.S.C. § 1365(d)

Fees and Costs, 28 U.S.C § 1912, § 1927

Foreign Intelligence Surveillance Act of 1978 (Pub.L. 95-511, § 110), 50 U.S.C. § 181.

Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E)

Government in the Sunshine Act, 5 U.S.C. § 552(b)(i)

Guam Organic Act (Pub.L. 95-134, § 204), 48 U.S.C. § 1424c(f)

Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c(a)(2), (d)(2), 26

Hobby Protection Act, 15 U.S.C. § 2102

Home Owners Loan Act of 1933, 12 U.S.C. § 1464(d)(8)

Housing and Community Development Amendments of 1979 (Pub.L. 96-153, § 405), 15 U.S.C. § 1709

Indian Claims Commission Act, 25 U.S.C. §§ 70n, 70V-3(a), (added by Pub.L. 95-69)

Indian Contract Act, 25 U.S.C. §§ 81, 82, 82(a), 85

Indian Reorganization Act, 25 U.S.C. § 476

International Claims Settlement Act, 22 U.S.C. §§ 1623(f), 1631(j), 1641(p), 1642(m), 1643(k), 1644(l)

Interstate Commerce Act, 49 U.S.C. §§ 11705(d)(3), 11708(c), 11710(b), 11711(d), 11711(e)

Japanese-American Evacuation Claims Act of 1948, 50 U.S.C. App. § 1985

Jewelers Hall-Mark Act, 15 U.S.C. § 298(b), (c), (d)

Jury System Improvements Act of 1978 (Pub.L. 95-972, § 6), 28 U.S.C. § 1875(d)(2)

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 431(c), 501(b)

Legal Services Corporation Act, 42 U.S.C. § 2996e(f)

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 465, 399(e)(1), 928.

Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(2)

Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1415(g)(4)

Merchant Marine Act of 1936, 46 U.S.C. § 1227

Mexican-American Chamizal Convention Act of 1946, 22 U.S.C. § 277d-21

Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. § 243

Mobile Home Construction and Safety Standards Act, 42 U.S.C. §§ 5412(b)

Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1918(a), 1989(a)

National Guard Act, 32 U.S.C. § 334

National Historic Preservation Act, 16 U.S.C. § 470W-4

National Housing Act, 12 U.S.C. § 1730(m)(3)

National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1400(b)

Natural Gas Pipeline Safety Act, 42 U.S.C. § 1686(e)

Noise Control Act of 1972, 42 U.S.C. § 4911(d)

Norris-LaGuardia Act, 29 U.S.C. § 107(e)

Ocean Dumping Act, 33 U.S.C. § 1415(g)(4)

Ocean Thermal Energy Conservation Act of 1980, 42 U.S.C. § 9124(d)

Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3766(c)(4)(B)

Organized Crime Control Act of 1970, 18 U.S.C. § 1964(c)

Outer Continental Shelf Lands Act (as amended by Pub.L. 95-372), 43 U.S.C. § 1349(a)(5), (b)(2)

Packers and Stockyards Act, 7 U.S.C. § 210(f)

Patent Infringement, 32 U.S.C. § 285

Perishable Agricultural Commodities Act, 7 U.S.C. § 499g(b), (c)

Petroleum Marketing Practices Act (Pub. L. 95-297, § 105(d), 15 U.S.C. § 2805(d)(1), (3)

Plant Variety Act, 7 U.S.C. § 2565

Privacy Act, 5 U.S.C. § 552a(g)(2)(B), (3)(B), (4)

Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435(d)

Public Utility Holding Company Act of 1935, 15 U.S.C. § 79g(d)(4), 79j(b)(2)

Public Utility Regulatory Polices Act of 1978 (Pub.L. 95-617, § 122), 16 U.S.C. § 2632(a)

Railroad Revitalization and Reform Act, 45 U.S.C. § 854(g)

Railroad Unemployment Insurance Act, 45 U.S.C. § 355(i)

Railway Labor Act, 45 U.S.C. 153(p)

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607(d)

Rehabilitation Act of 1973 (as amended by Pub.L. 95-602, § 120), 29 U.S.C. § 794a(b)

Right to Financial Privacy Act of 1978 (Pub.L. 95-630 §§ 1117(a), 1118), 12 U.S.C. §§ 3417(a), 3418

Safe Drinking Water Act, 42 U.S.C. §§ 300j-8(d), 9(i)(2)(B)(ii)

Securities Act of 1933, 15 U.S.C. § 77k(e)

Securities Exchange Act of 1934, 15 U.S.C. § 78r(a)

Securities Investor Protection Act, 15 U.S.C. § 78eee(b) (Pub.L. 95-283, § 7(b)(5))

Servicemen's Group Life Insurance Act, 38 U.S.C. § 784(g)

Sex Discrimination Prohibition (Title IX of Pub.L. 92-318), 20 U.S.C. § 1681 et seq. See 42 U.S.C. § 1988

Social Security Act Amendments of 1965, 42 U.S.C. § 406

Solid Waste Disposal Act, 42 U.S.C. §§ 6971(c), 6972(e)

State and Local Fiscal Assistance Amendment of 1976, 31 U.S.C. § 1244(e)

Surface Mining Control and Reclamation Act (Pub.L. 95-87), 30 U.S.C §§ 1270(d)(f), 1275(e), 1293(c)

Tax Reform Act of 1976, 26 U.S.C. § 6110(i)(2)

Toxic Substances Control Act, 15 U.S.C. §§ 2605(c)(4)(A), 2618(d), 2619(c)(2), 2620(b)(4)(C), 2622(b)(2)(B)

Trademark Act, 15 U.S.C. § 1117

Trading With the Enemy Act, 50 U.S.C. App. § 20

Trust Indenture Act, 15 U.S.C. § 77000(e), www(a)

Truth in Lending Act, 15 U.S.C. § 1640(a)

Unfair Competition Act, 15 U.S.C. § 72

Uniform Relocation Assistance and Real

Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4654

United States as a Party, 28 U.S.C. § 2412

Veterans' Benefits Act, 38 U.S.C. § 3404(c)

Voting Rights Amendment of 1975, 42 U.S.C. § 19731(e)

War Hazards Compensation Act, 42 U.S.C. § 1714

Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1365(d), 1367(c)

Wire Interception Act, 18 U.S.C. § 2520

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

MARY LOUCILLE COULTER	)	
	)	
vs.	)	NO. 3-83-0668
	)	
STATE OF TENNESSEE; DEPT. OF TRANSPORTATION, ET AL.	)	

M E M O R A N D U M

The leading trial attorney in this case was Aleta G. Arthur, who has been allowed a fee for her services at the rate of $85 per hour and which resulted in the allowance of a fee of $13,000. Robert Belton, a member of the staff of Vanderbilt University Law School, has likewise filed a petition for services rendered in said case and requested fees

for services as follows:

> for services rendered in 1982, $110 per hour;
>
> for services rendered in 1983 and 1984, $125 per hour.

The first thing that strikes the court as being unusual in this case is that in the case of Perkins v. State Board of Education, Case No. 77-3552, Belton filed a petition and affidavit with this court on October 15, 1984, in which he indicated that for services rendered in 1982, his fee was $85 per hour and for 1983 and 1984 it was $120 per hour. It seems to the court when affidavits are submitted in cases for services rendered in the same period of time they should at least be consistent. This court will treat the attorney fee petition accordingly.

If there ever was a simple case filed under Title VII of the Civil Rights Act, this is the case. The case was tried in less than half a day, and the court decided the case from the bench. In the preparation of the case four depositions were taken, and several form interrogatories and requests for admissions were filed. Mr. Belton has asked for fees totaling $22,000, and the lead counsel has requested and received a fee of $13,000. The court is aware that Mr. Belton is a competent attorney. However, the court is likewise aware that Mrs. Arthur is an excellent trial attorney with years of experience as an assistant United States Attorney and in private practice. She has poise and commands great respect in addition to being an excellent attorney. Therefore,

Mr. Belton does not have any more ability as far as the trial of this type of case is concerned than Mrs. Arthur. The question is what is a reasonable fee and what amount of time was properly spent.

The first item that causes the court some pause is that Mr. Belton claimed a total of 16 hours and 45 minutes for the preparation, filing and argument of a motion for summary judgment. On the face, it seems this is a Title VII case. It would be a most unique case, one of which this court is unaware, when a motion for summary judgment would be proper in a Title VII case. Mrs. Coulter requested a hearing which was granted, and the motion for summary judgment, its preparation and argument and the hearing thereof was a motion in futility. The

court will not allow the fee for those services to be charged against the defendant. This is not a paper lawsuit. Therefore 16 hours and 45 minutes will be deleted from the total hours claimed.

In connection with the stipulation of fact and pretrial conference, Mr. Belton claimed 44 hours and 10 minutes. Keep in mind that a great number of these hours must be dueplicates [sic] of the hours claimed by Arthur, and even without that being so, this is an inordinate amount of time in connection with a simple lawsuit in a matter in which Belton is an expert in the field and a professor handling the subject of discrimination at Vanderbilt Law School. The court will reduce those hours by 22 hours and 5 minutes.

In connection with the depositions taken, he claimed 20 hours and 5 minutes, and the depositions were taken by Aleta Arthur. As stated before, Aleta Arthur is a perfectly competent trial attorney and there was no need for Mr. Belton to be present at the taking thereof. However, the court will allow those hours because Mrs. Arthur may have felt better with someone holding her hand.

Another item is trial preparation, 18 hours. Mrs. Arthur had trial preparation. The court feels that 9 hours is sufficient time for trial preparation in a simple case of this nature. Therefore, the court will delete 9 hours.

In connection with the application for fee, Mr. Belton has listed approximately 13 hours. Three hours are

claimed for research, drafting and preparation of affidavits from Ashe and Robinson. Another 3 hours are claimed in connection with drafting and asking the court to take judicial notice of certain items, etc. The court is of the opinion that this is unreasonable and therefore reduces this amount to 5 hours.

The total number of hours claimed is 185.59. The total number of hours deleted is 55.83.

In accordance with the memorandum filed in the Perkins case, the court will allow $85 per hour for the 4.25 hours performed in 1982, the court finding that this is a reasonable charge for the services rendered at that time. As for the hours in 1983 and 1984, a fee of $110 per hour will be allowed, the court finding this a reasonable fee per hour

for the services rendered in accordance with Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979), cert. denied 447 U.S. 911, 100 S. Ct. 1999, 64 L. Ed. 2d 862 (1980), and Hensley v. Eckerhart, 76 L. Ed. 2d 40 (1983).

/s/
L. CLURE MORTON
SENIOR U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

MARY LOUCILLE COULTER	)	
	)	
VS.	)	NO. 3-83-0668
	)	
STATE OF TENNESSEE; DEPT. OF TRANSPORTATION, ET AL.	)	

O R D E R

In accordance with the memorandum contemporaneously filed, it is ORDERED that an attorney fee in the amount of FOURTEEN THOUSAND ONE HUNDRED SIXTY-SEVEN AND 35/100 ($14,167.35) DOLLARS be awarded to Robert Belton, Esq.

/s/

L. CLURE MORTON
SENIOR U. S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

MARY LUCILLE COULTER, Plaintiff	]	
vs.	]	No. 3-83-0668
STATE OF TENNESSEE, DEPARTMENT OF TRANSPORTATION, et al., Defendants	]	JUDGE L. CLURE MORTON

AGREED MEMORANDUM

The plaintiff, Mary Lucille Coulter, a female citizen of the United States, filed this action for relief pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. The plaintiff is an employee of the Department of Transportation of the State of Tennessee ("Transportation"), and she

alleged that Transportation and the other defendants have discriminated and continued to discriminate against her because of her sex in rejecting her application for a promotion to the position of Regional Office Manager. The plaintiff proceeded under the disparate treatment theory of discrimination established by the courts.

This case came on to be heard on July 2, 1984. The plaintiff introduced into evidence the Stipulations of Fact entered into between the parties and rested her case. The defendant called as witnesses James Phillip Davis, John Burke and James Harper. At the conclusion of the presentation of the defendants' case, the Court ruled from the bench, on the basis of the testimony of the witnesses, statements of counsel, and the entire

record in this cause, that the plaintiff had carried her burden of proving by the preponderance of the evidence that defendants had discriminated against the plaintiff on the basis of her sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq., by failing to promote her to the position of Regional Office Manager within Transportation and that she was entitled to appropriate relief. United States Postal Services Board v. Aikens, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

The parties have agreed to the following relief to be accorded to the

plaintiff as the prevailing party in this case:

1. The plaintiff shall be promoted, as of August 1, 1984, to the position of Administrative Services Assistant 3, the same position held by Gilford Walker, and shall be placed at the same grade and pay level as Gilford Walker. Due to a statewide reclassification, the title "Regional Office Manager" no longer exists within the State personnel system.

2. The defendants will pay to the plaintiff as back pay, plus interest, from July 1, 1982 through August 1, 1984, the sum of One Thousand Three Hundred

Fifty One Dollars and Ninety Four Cents ($1,351.94), to be paid to the plaintiff on January 2, 1985.

3. The defendants will reimburse the plaintiff for the following expenses:

Filing fee	$ 60.00
Deposition costs	889.25
Xeroxing expenses	340.85
Long distance telephone	2.53
	$1,292.63

4. The defendants shall credit the plaintiff with 31.8 hours of comp time for time spent consulting with attorneys, at depositions and in court in connection with her case.

5. The defendants shall pay to Aleta G. Arthur her reasonable attorney's fee of Thirteen Thousand Six Hundred Twenty One Dollars and Twenty Five Cents ($13,621.25).

The matter of reasonable attorney's fees to be paid to plaintiff's other counsel, Robert Belton, is reserved for later determination by the Court.

An appropriate order shall be entered.

/s/
L. CLURE MORTON

APPROVED FOR ENTRY:

/s/
ALETA G. ARTHUR

/s/
ROBERT BELTON

/s/
MICHAEL L. PARSONS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

MARY LUCILLE COULTER Plaintiff	]]]	
vs.	]	No. 3-83-0668
STATE OF TENNESSEE, DEPARTMENT OF TRANSPORTATION, et al. Defendants	]]]]]]	JUDGE L. CLURE MORTON

ORDER

In accordance with the Agreed Memorandum, judgement is hereby entered for the plaintiff, Mary Lucille Coulter, and it is hereby ORDERED that she be granted the relief set out therein.

/s/
L. CLURE MORTON